IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

L.R. of Mishrimal Vs. L.Rs. of Sukh Lal & Ors.

S.B.CIVIL SECOND APPEAL No.193 of 1981

Date of judgment : 14.7.2006

PRESENT
HON'BLE SHRI N P GUPTA,J.

REPORTABLE

Mr. RAJENDRA MEHTA, for the appellant / petitioner
Mr. HR SONI, for the respondent

BY THE COURT:

The defendant has filed second appeal in a suit for eviction filed on the ground of reasonable and bonafide necessity, default in payment of rent and subletting/ parting with possession of part of the rented premises.

The learned trial Court found the question of default in favour of the plaintiff and giving benefit of Section 13(6) of the Rajasthan Premises (Control of Rent and Eviction) Act (No. XVII 1950), hereafter to be referred to as 'the Act', the suit was not decreed on that count. Regarding the other two grounds, being reasonable and

bonafide necessity, being covered by issues No.5, and 11, and subletting/ parting with possession being covered by issue No.4, were decided against the plaintiff, and thus, the suit was dismissed vide judgment and decree dated 6.3.79. In appeal, learned District Judge, vide impugned judgment reversed the finding of the learned trial Court, on issue No.4, and held, that the defendant has allowed Tulsi Das to sit on the Chabutari, where Tulsi Das sells his merchandise by keeping a Peti. Thus, it is established that the defendant has sublet the disputed Chabutari to Tulsi Das, and has parted with possession. It was also found, that the mere fact that Tulsi Das has subsequently been removed, hardly makes any difference. Regarding bonafide necessity, the learned lower Appellate Court found it to be not established; and regarding comparative hardship, it was found to be more in favour of the tenant. Thus, the finding of the learned trial Court on issues No.5 and 11 were maintained. Consequently, in view of the finding on issue No.4, the suit of the plaintiff for eviction was decreed.

This appeal was filed on 12.11.81, and vide order dated 13.11.81, the appeal was admitted, by framing the substantial question, being, as to whether on facts and in the circumstances of the case, the learned Additional District Judge was not right in decreeing the plaintiff's suit for ejectment on the ground of subletting or parting

with the possession under Section 13(1)(e) of the act.

During pendency of the appeal, the plaintiff Banshi Lal expired on 12.7.86, and his legal representatives were ordered to be substituted vide order dated 8.12.87. Thereafter, the other proforma respondent, being Sukh Lal, also expired, and an application was filed for substitution of his legal representatives. The matter was going on in the service of legal representatives of respondent No.1, the proforma respondent. However, in the meanwhile, the appellant Misrimal also expired on 2.12.2004, and thereupon, an application was filed alleging that the appellant has left behind him four sons and one daughter, and that, he executed a Will dated 1.2.86, in favour of his grandson, Nihal Chand S/o Lal Chand Parakh, in respect of the suit shop, and consequently, it was contended that Nihal Chand alone represents the estate of the deceased-appellant, and right to continue the appeal survives upon him alone. A Photostat copy of the Will was also enclosed, and it was prayed that Nihal Chand be substituted in place of deceased Misrimal. On this application, vide order dated 17.3.2005, notice was ordered to be issued to the respondent, and also to the natural heirs of the deceased-appellant, on the details being provided by the appellant. In this process, on 27.4.2006, the Court felt concerned, in view of the fact, that appeal is as old as of the year 1981, and noticed, that the

service on the legal representatives of respondent No.1 is not being effected despite several attempts, during last more than 11 years, and therefore, the summons were ordered to be published in the local newspaper. Likewise, regarding natural heirs of the appellant also, it was directed, that the summons be got served by publication in local newspaper having circulation in Jodhpur, and somehow, as the things happened, at this time, nothing was noticed about the service or non-service of legal representatives of respondent No.2, the plaintiff. Be that as it may, thereafter, on 25.5.2006, it was found, that the applications are not being opposed by anybody, despite publication in newspaper, and accordingly, both the applications were allowed, i.e. substitution of legal representatives of the appellant, so also the respondent No.1. It is a different story, that as a matter of fact, by then, the legal representatives of respondent No.2 were not served with the notice of the application for substitution of legal representatives of the appellant. However, by this order, Nihal Chand was taken on record as legal representative of the appellant, pursuant to the Will dated 1.2.86. Thereafter, on 5.7.2006, it was found, that the respondent No.1 was impleaded only as a proforma defendant. In that view of the matter, it was ordered, that the service of his legal representatives need not be awaited, as the effected party was only respondent No.2, who was being represented. Accordingly, the matter was ordered to

be put up for hearing on 10.7.2006. Since then, the matter is being continuously heard till 13.7.2006.

Arguing the appeal, it was contended by the learned counsel for the appellant, that even from the pleadings of the plaintiff, if read in conjunction with the evidence led on the side of the plaintiff, no case of subletting or parting with possession of the rented shop has been made out. It was contended that there is material variance between pleading and proof, on the side of the plaintiff, inasmuch as, what has been pleaded in plaint, for that no evidence whatever has been led, and whatever has been sought to be proved, in that regard there is no pleading in the plaint. Then, it was contended, that in any case, all that has been found by the learned lower Appellate Court, which might be said to be a finding of fact, is as under:-

> "प्रतिवादी ने तूलसीराम को चबूतरी पर बेठाना शुरू कर दिया है और वहां तुलसीराम अपनी पेटी लगाकर सामान बेचता है"

which finding, in the circumstances of the case, even if taken on the face value, does not make out a case of subletting, or parting with possession, as contemplated by Section 13(1)(e) of the Act. Reliance was placed on a Division Bench judgment of this Court, in Amir Ahmed Vs. Yusuf, reported in 1985 RLR 718, on the judgments of

Hon'ble the Supreme Court, in Dipak Banerjee Vs. Lilabati, reported in (1987) 4 SCC-161, Delhi Stationers Vs. Rajendra, reported in (1990) 2 SCC-331, and Gopal Saran Vs. Satyanarayan, reported in (1989) 3 SCC-56, and it was contended, that the basic gravamen of the requirement of subletting, or parting with possession is, that the person put in possession should have been put in exclusive possession, i.e. it should be having exclusive right to enjoy the property, which must be in lieu of payment of some compensation, or rent, and even if it were to be considered to be parting with possession, it must be shown, that the person in whose favour the possession was parted, was put in possession with right to include, and also a right to exclude others, and that, in the event of anything short of it, it would not amount to either subletting, or parting with possession.

With this preface, I was carried through the pleadings of the parties, and the evidence led on the side of either parties, and therefrom, it was sought to be contended, that even from the entire material on record, all that can be said to be made out is, that Tulsi Das was simply allowed to sit on a part of Chabutari, and was allowed to keep his box, but then, since admittedly the shop was rented out to the appellant, and Tulsi Das had no right to include anybody else, or exclude anybody-else, nor was he paying any rent, nor was he in possession, as such

it cannot be said, that the rented premises have been sublet. The other limb of argument is, that according to the plaint, the shop was pleaded to have been sublet, while in the evidence, all that has been said is, that Tulsi Das was allowed to sit on Chabutari, while from a reading of relevant para-5 of the plaint itself, it is clear, that the plaintiff is conscious about the distinction between the shop and Chabutari, inasmuch as, the shop along with Chabutari has been alleged to be let out, i.e. to be the rented premises, and in that background, the allegation is, of having sub-let the shop, (and not Chabutari), therefore, the decree on the ground of subletting could not be passed. Alternatively it was submitted, that Tulsi Das was allowed to sit on Chabutari only for two days, in view of the circumstances shown by the defendant, being, that the shop of Daulat Ram was undergoing Deepawali cleaning, and in that process he was simply allowed to sit, in view of the fact, that Daulat Ram and appellant are close relatives. It was also submitted that this version of the appellant has been illegally discarded by the learned courts below, for want of pleading, while the case of the plaintiff, about allowing Tulsi Das to sit on Chabutari, has been accepted, even without any pleading in that regard being there. Various other detailed submissions were made, which I will deal later, and it was submitted, that decree is liable to be set aside.

Since at the beginning of the argument, learned counsel for the respondent had raised an objection to the effect, that since the decree for eviction had been passed against Mishrimal by the learned lower Appellate Court on 20.8.1981, the status of Mishrimal was only that of statutory tenant, and during pendency of the appeal he having died on 2.12.2004, Nihal Chand, who has been substituted in place of appellant Mishrimal, being not falling within the category of one of the persons enumerated in Section 3(7)(b) of the act, as persons entitled to be treated as tenant, in the event of death of tenant, the appeal no more survives, as Nihal Chand does not enjoy any protection of law. To reply this contention, in the opening arguments itself, learned counsel for the appellant argued the matter, and submitted, that Nihal Chand is the grand son of the appellant Mishrimal, being son's son, and in his favour a will was executed by Mishrimal, way back on 1.2.1986, and therefore, Nihal Chand is heir of deceased, and as is clear from the averments of the will, that Nihal Chand was living with the appellant Mishrimal, and was looking after his business since long before the death of Mishrimal, Nihal Chand clearly falls within the definition of the expression "other heir in accordance with the personal law applicable to him who had been.... ordinarily carrying on business with him in such premises as member of his family upto his death", and therefore, he clearly falls within the definition of

"tenant" as mentioned therein, and therefore, he is very much entitled to the protection of the Act, and the appeal survives. Elaborating the argument, it was submitted, that the question of heirship is covered by the provisions of Hindu Succession Act, which in its scheme divides succession into two types, one being intestate, as provided by Chapter-II, and the other being Testamentary, as provided by Chapter III, comprising of Section 30, and a person succeeding to the estate of the deceased, by either of nature of succession, is obviously an 'heir', and since Hindu Succession Act is the personal law, which was applicable to the deceased, Nihal Chand clearly falls within the definition of "heir", by testamentary succession.

Arguing upon the scope, and ambit of expression "heir", relying upon the judgments in Gulzara Singh Vs. Smt. Tej Kaur reported in AIR 1961 Punjab-288, Smt. Angurbala Vs. Debarata Mullick reported in AIR 1951 SC-293, and N. Krishnammal Vs. Ekambaram reported in AIR 1979 SC-1298, it was submitted that heir should be given a broad, and general meaning so as to include all those on whom the estate of the deceased devolve, whether intestate or under a testamentary instruments like will, and the findings in Angurbala's case were stressed, where Hon'ble the Supreme Court held, that the word "heir" cannot normally be limited to issue only, it must mean all persons who are entitled to

the property of another under law of inheritance. It was also submitted, that this judgment was followed in N. Krishnammal's case.

On the other hand, learned counsel for the respondent, first argued about survival of appeal, contending that according to Section 3(vii)(b), three is three fold requirement, in order to entitle Nihal Chand to continue the appeal, say for availability of protection of the Act, in the event of death of the statutory tenant, being; one, that he should be heir in accordance with personal law, secondly he/she should be carrying on business with him at the time of death, and thirdly such carrying on business at the time of death should be as a member of family. In the present case, may be, that Nihal Chand was carrying on business with the deceased at the time of his death, and, for the sake of argument, may also be, that he might be claiming to be so carrying on business as member of the family of the deceased, but then, he can neither be said to be member of the family, nor can he be said to be heir in accordance with personal law. Learned counsel invited my attention to the provisions of Section 3 (f) of the Hindu Succession Act, which statutorily defines the term “heir”, to mean, any person, male or female, who is entitled to succeed to the property of an intestate under this Act. Much stress was laid on the word “intestate”, to contend, that this statutory definition of

the expression “heir”, specifically confines the meaning, to the persons who succeed to the property of an “intestate”, and this clearly exclude the person who succeeds on a testamentary document. Carrying the argument further, it was submitted, that in the ultimate analysis making a will tantamounts to assignment of the property, or the right of the tenancy. May be that such assignment is not inter vivos, but is testamentary, but nonetheless it does constitute assignment, which is prohibited by Section 13(1)(e) of the Act, with the result, that apart from the fact, that such assignment itself constitutes a ground of eviction under Section 13(1)(e), in any case, the person succeeding on the basis of such testamentary document cannot be said to be better than assignee, and is not entitled to protection of the Act. Reliance in this regard was placed on the judgment of Hon’ble Supreme Court, in Vasant Pratap Vs. Dr. Anant, reported in (1994) 3 SCC-481. Reference was also made to Section 59 of the Indian Succession Act to contend, that will can be made with respect to property, which the testator can dispose, while in the present case, since even at the time of making of the will, which was made on 1.2.1986, decree for eviction had already been passed, way back on 20.8.1981, the deceased was only a statutory tenant, which right could not, and did not, constitute any assignable property, capable of being bequeathed by way of will, therefore also, it does not confer any right on Nihal Chand, to continue

the appeal. Then by making reference to some of the provisions of the Transfer of Property Act, like Section 105, 107, Section 6, and Section 108 etc. it was sought to be contended, that tenancy rights cannot be said to be transferable rights. Then, referring to Section 30, constituting Chapter III of the Hindu Succession Act, it was contended, that a bare reading of this section shows, that even thereunder, making of the will is taken to be an act of disposal of the property of the testator, and all that is provided is, that a Hindu may dispose of, by will or other testamentary disposition, any property capable of being so disposed of by him, in accordance with the provisions of Indian Succession Act, 1925, or any other law for the time being in force, and applicable to Hindus. Thus, even by language of Section 30, it does not in any manner even contemplate, that the person in whose favour any will is executed would be the heir of the deceased. Then, referring to the relationship, it was contended, that Nihal Chand is the son of the son of deceased, and father of Nihal Chand, being Lal Chand, being admittedly alive, on the face of the provisions of Section 8 of the Succession Act, read with the first Schedule, the presence of the father of Nihal Chand excludes Nihal Chand from the category of heir, as qua the deceased, his son being available, son of the son does not get any right as class I heir, therefore, he cannot be said to be an heir.

Then, placing reliance on the Constitutional Bench judgment of Hon'ble the Supreme Court in Smt. Gian Devi Vs. Jeevan Kumar, reported in 1985 SC-796, S.J. Pande Vs. P.K. Balakrishnan, reported in 1993 SC-2132, and Jaspal Singh Vs. A.D.J. Bulandsahar reported in (1984) 4 SCC-434, it was contended, that statutory tenant has no transferable interest, and that, a person claiming under a will from the tenant is not entitled to the protection. Relying on the judgment of Vasant Pratap's case it was also submitted, that will cannot confer any right on the person, in whose favour will is made, and if that were permitted, since will can be made in favour of stranger, and cannot be restricted to be made in favour of natural heir, or member of family only, the wishes of statutory tenant cannot be thrust upon the landlord, who is not statutorily bound to suffer such person as a tenant. On the basis of this authority it was also contended, that statutory tenancy is not heritable, otherwise than to the extent as permitted by the relevant Rent Control Statute. Likewise this judgment was also relied upon to contend, that it is held therein, that a legatee under the will does not fall within the definition of heir. Reliance was also placed on the judgment of Hon’ble the Supreme Court, in Bhavarlal Labhchand Shah Vs. Kanaiyalal Nathalal Intawala, reported in (1986) 1 SCC 571.

It was also contended that according to language of Section 3(vii) of the act, apart from the relatives

mentioned therein, the other persons permissible to be treated tenant is only heir, and to read testamentary or any other type of successor, or legatee, in the provisions of Section 3(vii) of the act, would be tentamounting to reading something which is not included in the statute, which is not permissible.

Then, reliance was placed on judgments of this Court in Gopi Kishan Vs. Bajrang Lal reported in 1996 AIHC-4064, and Chiman Lal Vs. Narendra reported in 1996 AIHC-2050, to contend, that in order to claim protection of the Act, by recourse to the provisions of Section 3(vii), the person so claiming protection should, firstly be heir, and secondly should be carrying on business as member of the family of the deceased at the time of his death. Reliance was also placed on the judgment, in Venkatesh Vs. S.S. Hawaldar reported in 1998(1) Apex Court Journal-1, to contend, that statutory tenancy is not heritable, and that, since the eviction decree had already been passed in 1981, even at the time of making the will the deceased was only a statutory tenant.

Then, alternatively reading the will it was contended, that therein the business has been described as his personal business as contra-distinguished from the ancestral or H.U.F. business. Then, it is also recited therein, that the testator's sons are carrying on their

independent business. Then, it is recited, that the grand son is living with the testator, and is taking care of the business (देखरेख करता है). It was contended, that with these recitals what was bequeathed was the name of the firm, and the business. Thus, only the goodwill attached to the name of the firm entitling the legatee to use the firm's name, and then the existing business was transferred. Obviously meaning, the tangible goods, assets, and liabilities; to be specific, tenancy rights in the premises were not bequeathed. In that view of the matter, on the face of the availability of class I heir, Nihal Chand does not get anything under the will, so far tenancy rights are concerned. Likewise it was also stressed, that even in will, it is not averred that Nihal Chand was carrying on business with Mishrimal as member of his family, and in absence of any such averment in the will, the family normally does not include the grand son. It was thus contended, that taken from any stand point Nihal Chand does not fall within the definition of tenant under Section 3 (vii) of the Act, nor is he entitled to any protection of the Act, with the result, that the appeal no more survives, and is liable to be dismissed.

Then, arguing on merits, it was submitted that in the present case subletting is clearly made out, inasmuch as, the premises that have been let out have been described in the plaint to be the "shop including the Chabutari", and

under Section 13(1)(e) of the Act, subletting, and parting with possession, even of part of the rented premises, does render the tenant liable to eviction. Chabutari being very much part of the rented premises, where Tulsi Das has been inducted, does constitute subletting. Then, it was contended, that so far as the submission about variance between pleading and proof is concerned, no substantial question of law has been framed on this aspect of the matter, nor is it shown, that on that count, either the learned courts below have been misdirected, or that the parties have been mislead, rather the parties were fully alive to the controversy, and had clearly lead evidence without any objection. In that view of the matter, now at the second appeal stage, the appellant cannot be allowed to agitate this contention. Then referring to rent note, it was reiterated that the shop and Chabutari collectively constituted one premises, and is one tenancy, and therefore, subletting or parting with possession of even a part of this property renders the appellant liable to eviction. Then, the argument earlier made was again repeated, that since admittedly the possession of the property is with the grand son, who is not the heir, and therefore, this also amounts to subletting, or parting with possession in his favour, hence decree is required to be maintained, even on this ground, by exercising powers of this Court under O. 41 Rule 33 C.P.C. It was also submitted that it was not necessary for the plaintiff to have

specifically pleaded about Chabutari having been sublet, as this was not material, more so when it is admitted position, that the Chabutari is part of the rented premises, and Tulsi Das was allowed to use Chabutari, apart from the fact, that on this count no objection was raised earlier. Relying on the judgment in OM Prakash Vs. Smt. Vidya Wati, reported in 1979(1) RCR-567, it was contended, that therein, in a cloth merchant's shop, where the a tailor was allowed to sit, it was found to be subletting, and therefore also, in the present case subletting is made out. In this regard reliance was also placed on the judgment of this court, in Shri Kishan Agarwal Vs. Pitamber, reported in 2004 Current Judgments (Rent Control)-269, and it was contended, that in that case, the premises were occupied, in the name of different companies, and though the Managing Director /Chairman of the two companies was the same, still it was held, that each company is a separate legal entity, and was held to be a case of subletting. Then, it was submitted that a look at para-7 of the judgment of learned lower Appellate Court does make it more than clear, that the defendant is deliberately concealing truth from the Court, and is rather telling lie, inasmuch as from the photograph Ex. 1 it is very much clear, that therein Tulsi Das is clearly seen carrying on business on the Chabutari of the shop, and the defendant has avoided to answer, by simply deposing his inability to identify Tulsi Das, on the pretext of

photograph being blurred. This shows that somehow or the other the defendant is out and out to get out of the position of inducting Tulsi Das. Then, it was also submitted, that even if the part of the premises is given for a short time, still that constitutes parting with possession. Then, relying upon the judgment in the case of Maqsood Vs. Bhoal Nath, reported in 2005 Current Judgments (Rent Control)-166, and Radha Kishan Vs. Madanlal, reported in 2005 Current Judgments (Rent Control)-440, it was submitted that both the parties had already led evidence. In that view of the matter, stress cannot be laid on absence of the pleading in the plaint. Likewise reliance was also placed on the judgment, in the case of Gurdial Singh Vs. Rajkumar, reported in 2002(1) Apex Court Judgments-365.

Then, controverting the contention of the appellant, it was contended, that there is no reliable tangible material on record to show that Tulsi Das was working on the shop of Daulat Ram, so as to attach any credibility to the averment of the appellant, about Tulsi Das having been allowed to sit for two days, on account of Deepawali cleaning, being undertaken in the shop of Daulat Ram. Thus, it was contended, that the learned lower Appellate Court has rightly found subletting/parting with the possession.

The learned counsel then submitted, that though he has not filed cross objections, but then in view of the judgments of Hon'ble the Supreme Court, in Virdhachalam Pillai Vs. Chaldean Syrian Bank Ltd., reported in 1964 SC-1425, Smt.Ganga Bai Vs. Vijay Kumar & Ors., reported in 1974 SC-1126, and the State of Myssore Vs. C.N.Vijendra Rao reported in 1976 SC-477, and Banarasi & Ors. Vs. Ramphal reported in 2003(1) Apex Court Journal-639, and judgment of this Court in Shriniwas Vs. Keshri Chand & Ors., reported in 1984 Raj.-14, he can support the decree even on the ground which have been decided against him by the learned lower Appellate Court, and submitted, that the plaintiff had filed suit on the ground of reasonable and bonafide necessity of the premises as well, and had pleaded the aspect of comparative hardship, but these questions have been wrongly decided against him by the learned lower Appellate Court, and therefore, apart from the ground of subletting, the decree is required to be maintained even on the ground of reasonable and bonafide necessity. Then the learned counsel read to me the pleading and evidence, to show, that the findings recorded by the learned lower Appellate Court on the ground of reasonable and bonafide necessity is out come of irrelevant considerations, and exclusion of relevant considerations, and is therefore, vitiated. It was submitted that of course notice for enhancement of rent was given on 8.10.1970, and thereafter on 4.11.1970 the notice was given for vacating the shop on

the ground of reasonable necessity of the plaintiff, this circumstance has been taken into consideration by the learned lower Appellate Court, as if the plaintiff wanted to enhance rent, and thereafter he desired to have the shop vacated. It was submitted, that this cannot be said to be such a conduct of the plaintiff, which may negative the reasonable and bonafide necessity, and comparative hardship. It was submitted, that the question of comparative hardship has been decided merely on the consideration, that the plaintiff is carrying on the tailoring work on the first floor for the last number of years, thus he has premises, while on the decree of eviction being passed the defendant's entire business would be closed. According to the learned counsel, these are not relevant considerations for deciding the question of comparative hardship. If the defendants suffer closure of the business on account of eviction, that is a natural consequence of eviction, which, in view of the judgment of Hon'ble the Supreme Court, in Bega Begum Vs. Abdul Rehman, reported in 1979 SC-272, does not constitute a consideration for deciding the question of comparative hardship. Then, reading the evidence of the plaintiff, and his witnesses on the aspect of bonafide necessity, it was submitted that from the evidence the requirement is sufficiently established, which has not been satisfactorily controverted, and there is no sufficient rebuttal.

In rejoinder it was submitted by Mr. Mehta, that the findings of the two learned courts below on the question of reasonable and bonafide necessity and partial eviction are pure findings of fact, not requiring interference by this Court in second appeal. Then, the submissions made in opening arguments, were practically reiterated, and the judgments cited by the learned counsel for the respondents were attempted to be distinguished on various basis, and it was prayed, that the appeal be allowed.

I have considered the submissions, have gone through the various judgments cited at the Bar, and the entire record very closely.

I may first take up the contention raised by the learned counsel for the respondent about the plaintiff's entitlement to have the decree maintained on the ground of reasonable and bonafide necessity, while deciding the question of comparative hardship, both of which issues have been decided by both the learned courts below against the plaintiff.

It is one thing to notice, and as contended by the learned counsel for the appellant, that the question of reasonable and bonafide necessity, so also the question of comparative hardship, are questions of fact, and two

learned courts below have decided the questions concurrently against the plaintiff. At the same time it is also true, that the considerations taken into account by the learned courts below for deciding the question of reasonable and bonafide necessity, so also the question of comparative hardship, do not appear to be wholly relevant, if considered on the anvil of various authoritative pronouncements of Hon'ble the Supreme Court. Consequently, in my view, the question of reasonable and bonafide necessity and comparative hardship, in the present case are questions which could be examined by me, even within the limited scope of Section 100 C.P.C. However, for another very significant reason, I do not feel inclined to go into these questions. The reason being, that a look at the plaint shows, that the case of the plaintiff as set up for reasonable and bonafide necessity is, as pleaded in para-6 of the plaint, being that the plaintiff requires the premises for himself, as he carries on the business of tailoring, the plaintiff has got the shop including Chabutari remodeled in October 1970, with the result that the shop and Chabutari became more reasonable for the plaintiff's business. The plaintiff would be able to augment his business in the shop, and along with the tailoring work, he will also keep essential cloth and other allied articles, and will sell them. Thus, the plaintiff has claimed his reasonable and bonafide necessity. In the written statement the plea taken was, that the plaintiff

has sufficient accommodation for carrying on the tailoring business, and does not need the suit shop. The allegation of remodeling was admitted, but it was submitted, that on remodeling, the plaintiff has got sufficient additional accommodation, on the already existing first floor. Then, with remodeling, the plaintiff continued to insist for increase of rent, and on the defendant's declining to increase, the plaintiff stopped installation of shutters. The theory of keeping the cloth and other articles and selling them was denied as concoction.

Thus the requirement pleaded, was the personal requirement of the plaintiff. In this background it is significant to note, that during pendency of the appeal, it is way back on 12.7.1986, that the plaintiff has expired, and since then, nothing has been shown on the side of the plaintiff, that even in these changed circumstances, reasonable and bonafide necessity of the plaintiff at all subsists. Even during the course of arguments of this appeal, nothing was submitted in this regard by the learned counsel for the plaintiff. In that view of the matter, I am not inclined to go into the question of said reasonable and bonafide necessity of the plaintiff.

I then take up the question of subletting/parting with the possession.

In this regard again a look at the plaint shows that in para-1 the rented property has been described as shop with Chabutari. Then, in para-5 it has been pleaded that the defendant has sublet the suit shop to Tulsi Das or has parted with the possession in his favour, and therefore, the plaintiff is entitled to get vacant possession of the shop along with Chabutari. Obviously the plaintiff's categoric case is, that the defendant has sublet or parted with possession of the shop in favour of Tulsi Das, which pleading was denied in the written statement, by pleading, that the defendant has never sublet or parted with the possession of shop, and that the defendant is carrying on the business in the shop as usual. Learned counsel for the appellant, in my view, has rightly contended, that the plaintiff is very much aware of the distinction between the shop and the Chabutari, and is also conscious of distinction between the two, and it is with this consciousness, that in para-5, the pleading has been taken about subletting/parting with the possession of the shop, and on that ground has claimed to be entitled to get vacant possession of the shop, along with Chabutari. It is true, that as contended by the learned counsel for the plaintiff, the shop along with Chabutari constituted one tenement, the tenancy thereof was one, and parting with possession even of any part of the rented premises could provide ground of eviction to the plaintiff, and to that extent there is no dispute, but then the question is, as to

what is the plaintiff's case. In other words, to be very brief, it is not the plaintiff's case, that the tenant has parted with the possession of part of the rented premises, being Chabutari, whether by allowing Tulsi Das to sit on the Chabutari, or otherwise, rather a plain reading of the plaint conveys, that the case of the plaintiff is, as if the defendant has altogether sublet/parted with the possession of the shop to Tulsi Das. Then, the issue framed in this regard also shows, that the controversy comprehended was, as to whether the defendant has sublet or parted with the possession of the shop and the Chabutari, in favour of Tulsi Das. Thus, the parties were ad idem, and have gone to trial with the consciousness, that the controversy to be decided was, that the defendant has sublet or parted with the possession of the shop. In this background a look at the statement of the plaintiff, and his witnesses, does show, that it has been deposed by the plaintiff in this regard, that the defendant sublet the shop by allowing Tulsi Das to sit on his shop, whereupon the plaintiff objected. Then, it is also deposed that Tulsi Das keeps the box (Peti) containing colours etc. inside the shop. Then, on being cross-examined, the things became clear, when the plaintiff admitted, that it is the defendant who puts lock on the shop, and that he is in possession of the shop, and further, that Tulsi Das was sitting on the Chabutari, while selling his merchandise, and plaintiff's witness P.W.2 has admitted that Tulsi Das

was sitting on the Chabutari, and used to keep goods in the shop during night. Significantly in chief, this witness has said, that Tulsi Das used to sale colours on the shop of the defendant. This does show, that in the examination in chief, the plaintiff and his witnesses did try to depose, that Tulsi Das was carrying on the business in the shop, but then they admitted, that he was sitting only on the Chabutari. Much stress was laid by the learned lower Appellate Court on the admission of the defendant, to the effect, that he allowed Tulsi Das to sit on the Chabutari for a couple of days, but then, this was not suggested to the plaintiff or his witness, nor was it pleaded in the written statement. It is true that it has not been pleaded in the written statement, and it has not been suggested to the plaintiff or his witnesses either, but then, the fact does remain, that it was not the plaintiff's case either, that the defendant had sublet or parted with the Chabutari, or part of the rented premises was given on rent, or had parted with possession thereof. Much is said on the basis of the photographs Ex. 1, 2 and 3. Significantly even according to the plaintiff's averment in the plaint, he had remodeled the premises in October, 1970, and the three photographs also purport to be of 20th October, 1970. In this background, a look at the photographs also show, that perhaps at that time itself that Chabutari was covered, otherwise it must have been lying open. Then, as appears from photographs, specifically photograph Ex. 2 and 3, that

the frontage of the shop is divided into two parts, and then, since photos are of the same day, in Ex. 2, and even in Ex. 3, Mustanga (being a basic instrument of working of the defendant) is clearly visible, lying in the Verandah, (Chabutari), outside the shop, and in that background, the box is alleged to be lying in the other smaller part of the Verandah, shown by Mark B, while the said sub tenant is shown to be sitting in Verandah at point-A, and even if photograph were to be read on the face value, as the plaintiff wants to read, these photograph do not show Tulsi Das to be carrying on any business in the Verandah, or to be sitting there in the capacity as a sub tenant, or a person in whose favour the possession may have been parted with. Rather, in my view, the photo Ex. 3, on the other hand, clearly negatives the theory of any subletting, or parting with the possession, even of Verandah, by defendant to Tulsi Das.

Then a look at the findings of the learned lower Appellate Court shows, that even by the learned lower Appellate Court, all that has been found is, that the defendant has allowed Tulsi Das to sit on Chabutari, where he sales his merchandise by keeping a box. It is a different story, that a naked eye view at Ex. 3 negatives this finding; for the sake of argument, realising my limitations of second appellate jurisdiction, this finding as recorded, even if were to be taken on the face value,

still in my view, as a matter of law, the learned lower Appellate Court was in error, in finding a case of subletting/parting with the possession, having been made out, within the meaning of Section 13(1)(e) of the Act.

The tests for deciding the question as to whether even the occupier of separate apartment in a premises can be said to be a sub tenant or not, have been laid down to be, as to whether the landlord retained control over the apartment, and if it is not shown, that the alleged sub tenant was in exclusive possession of any part of the premises, over which the original tenant has no control at all, then it would not make out any case of subletting or parting with possession. I may in this regard refer to the judgment of Hon'ble Supreme Court, in Dipak Banerjee's case relied upon by the learned counsel for the appellant. In Dipak Banrjee's case, the defendant had been alleged to have inducted one Lalit Mohan Biswas, who had established tailoring business, and another to one Mritunjoy Mukherjee, who was alleged to have opened a Music School. It was found on evidence, that Lalit Mohan was doing some sewing work for the tenant, and he was also doing some independent work for others, and was taking meals with the tenant, and that he was so allowed to occupy part of the premises due to pity and charity, and without any rent. On these facts, relying on the earlier judgment of Hon'ble the Supreme Court, in Associated Hotels of India Ltd., Delhi Vs. S.B.

Sarkar Ranjit Singh, reported in AIR 1968 SC 933, it was held, that for deciding the question as to whether the occupier of a separate apartment in a premises was a licensee or a tenant, the test was whether the landlord had retained control over the apartment. Then it was held, that there is no evidence of the fact, that the alleged sub tenant was in exclusive occupation of any part of the premises, over which the tenant had not retained any control at all. The essential ingredient necessary for a finding of sub-tenancy was thus found to be not proved. Likewise, again in Delhi Stationer's case, dealing with the case, arising under the Rajasthan Act, itself, it was held by Hon'ble the Supreme Court that the tenant is liable to be evicted, if he has assigned, sub-let or otherwise parted with the possession of the whole or any part of the premises without the permission of the landlord. It was further held that "Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. Parting of the legal possession means possession with the right to include and also a right to exclude others. Mere occupation is not sufficient to infer either sub-tenancy or parting with possession."

In that case, the alleged sub-tenant was the brother-in-law, and was employed with the appellant. That

apart, he was said to be a co-tenant in another room, and was simply allowed to use kitchen and latrine by the tenant, while residing in a portion let out to the sub-tenant. On these facts, it was found, that it cannot be said, that the tenant had transferred the exclusive right to enjoy the kitchen and latrine, and had parted with the legal possession of the said premises, in favour of the alleged sub-tenant.

In this case the judgment in Gopal Saran's case, where the tenant got an advertisement board of another company fixed on the terrace of the shop above his own board, for which he took Rs.1500/- for three years inclusive painting of the board and other expenses, and it was held, that it would not be tantamounting to sub-letting or parting with possession, to such a degree by permitting the hoarding, that the tenant had lost interest. It was found to be using the premises for his benefit, he was found to be not liable to be evicted. It was also held that mere occupation is not sufficient to infer either sub-tenancy or parting with possession. Parting with possession was held to mean possession with legal right to include and also right to exclude others. Subletting was held to mean transfer of an exclusive right to enjoy the property in favour of the third party. Assignment was held to mean a transfer or making over to another of the whole of any

property, real or personal, in possession or in action, or of any estate or right therein, was considered and followed.

I may also refer to an earlier Division Bench judgment of this Court, relied upon by the learned counsel for the appellant, being, Amir Ahmed's case, wherein the correctness of the earlier decision of this Court in Bhagwati Prasad Vs. Dwarka Prasad, reported in 1969 WLN-351, was examined, and that judgment was over-ruled. It is significant to note, that the substance of the argument on the question of subletting, made on the side of the learned counsel for the plaintiff, was on the basis of Bhagwati Prasad's case, and it is for this reason, that I am referring to Amir Ahmed's case. In Amir Ahmed's case the allegation was of subletting of half of portion of Barsali by the defendant to one Ramzan. The apartment in question was half portion of the Barsali, one kitchen, one latrine, two rooms, chowk and Chabutri on the ground floor of the house. In that case the learned Single Judge referring to Bhagwati Prasad's case observed, that the distinction has to be drawn between sharing of the possession of the premises, and parting of the possession of the premises. The view taken in Bhagwati Prasad's case was, that the tenant sharing the possession with another person could be said to have been parted with possession, while according to learned Single Judge this needed reconsideration. The

Division Bench considering the various case law, including the earlier judgments, and judgment of other High Courts, concluded in para-16 as under:-

> "16. Our answer to the three questions referred to by the learned Single Judge are as under:-
>
> (1) Where a tenant allows another person to mere use the premises or part of the premises, he cannot be said to have parted with possession of the premises or part of the premises so as to entail the liability of eviction u/s. 13 (1)(e) of the Act.
>
> (2) that the conversion of exclusive possession of the premises by the tenant into a joint possession of the premises by the tenant and a third person, does not constitute parting with possession u/s. 13(1)(e) of the Act.
>
> (3) that the decision in Bhagwati Prasad's case (1) so far as it holds that a tenant by sharing the premises with a third person can be said to have parted with the possession of the premises does not lay down the correct law.
>
> All the questions referred by the learned single Judge which have been mentioned hereinabove are, therefore, answered in the negative."

So far as the cases cited by the learned counsel for the respondent, in this regard, are concerned, in Om Prakash's case, of course, action of the tenant in allowing one person for tailoring in cloth merchant shop was found to be subletting by the Punjab and Haryana High Court. However, facts in that case are very telling, inasmuch as,

what was found on facts was, that a part of the back wall in the shop in dispute was placed in the exclusive possession of Milkiyat Singh, the sub tenant, by constructing a wall, with the help of which, back portion of the shop was converted into separate room, and the two persons were not related to each other, rather were utter strangers. Apart from the fact, that there was document to show, that the sub tenant was paying Rs. 30/- as rent, for the portion, which was in his occupation. It was on these facts, that subletting was found to have been effected. In my view, I need not say more than that the case in hand is altogether distinguishable on facts. In Shri Kishan's case again, the facts were altogether different. From perusal of judgment it transpires that the allegation of the plaintiff was that the suit house was given for residential purposes, while the defendant has sublet it to six private limited companies, as described in para-13 of the plaint, that there were no office of any company in 1962, when the suit hall was let out, and that on enquiries it transpired that the companies were established in the suit house in the year 1966, 1968, 1976, 1977, 1983, and 1985, and the defendant is either Director or Chairman of these companies. The stand of the defendant was, that there was no condition that the premises will be used only for residential purpose, rather it was let out for residential and business purposes, and the office of M/s. Oriental Talc Products Pvt. Ltd. was established since the beginning of

tenancy, and no other office of any other company was ever opened in the suit house. It was admitted, that the defendant is Chairman cum Managing Director, and family business of the defendant is carried out in these companies. It was on these facts, that this Court in para-26 found, that it is a clear case of subletting and parting with the possession of the portion of the suit house. It was not in dispute, that the office of M/s. Oriental Talc Products Pvt. Ltd. was shifted in the year 1972, i.e. 26 years ago before filing the suit, but the offices of two companies, namely Lucky Minimat and Best Chemicals were shifted in the suit house w.e.f. 1.1.1997. Thus, it was found to be subletting, and it was held that the mere fact that the defendant tenant is Managing Director/ Chairman in these companies, does not alter the legal position, as each company is a separate legal entity.

Then, Gurdial Singh's case need not detain me, for the simple reason, that in that case the relevant provisions of the statute required written consent before subletting, and it was held, that when the law requires written consent it could not have been substituted by oral consent, which is not a case here. So far as cases of Maqsood and Radhakishan are concerned; in Radhakishan's case it was clear finding, that the alleged sub tenant was found in exclusive possession of the suit premises, and it was not proved, that the business he carried on was joint

business of the tenant and sub tenant, and in Maqsood's case this Court interalia considered, that the alleged sub tenant was carrying on separate business, on the sublet counter in the same shop, and thus it was found to be a case of subletting. In my view these judgments also do not help the case of the plaintiff at all.

In my view on the face of the judgments in Dipak Banerjee's case, Gopal Saran's case, Delhi Stationer's case, and Amir Ahmed's case, in the present case, there is no escape from the conclusion, that even if the finding, as recorded by the learned lower Appellate Court, on factual aspect is maintained, still it does not amount to subletting, or parting with the possession, by the appellant to Tulsi Das, and thus the substantial question of law, framed vide order dt. 13.11.2001, is answered in favour of the appellant, and it is held, that learned lower Appellate Court was in error in decreeing the suit of the plaintiff for eviction on this ground.

Ordinarily this would have been the end of the matter, resulting in acceptance of the appeal, and dismissal of the suit, but then, the substantial objection raised on the side of the respondent, about non survival of the appeal, on account of death of appellant Mishrimal, who died on 2.12.2004, i.e. after passing of the decree for eviction by the learned lower Appellate Court, which was

passed on 20.8.1981, does still survive, and is now required to be dealt with.

In order to appreciate this question, as to whether in view of the fact, that the tenant, against whom the decree for eviction was passed in 1981, having died in the year 2004, during pendency of the appeal, the present appeal at all survives; some of the admitted facts may be catalogued, viz. that the decree for eviction was passed against the appellant on 20.8.1981, appellant died on 2.12.2004, appellant had sons who are already carrying on their separate business, the appellant also has a grand son Nihal Chand s/o Lal Chand, who is said to have been carrying on business with the deceased tenant at the time of his death, and as a member of his family, in favour of Nihal Chand a will has been executed by the deceased tenant on 1.2.1986.

The question then is, as to whether on these undisputed facts does the appeal survive, or in other words the grand son Nihal Chand falls within the definition of "tenant", so as to entitled to continue the appeal, enjoying the protection of the Act.

To decide this controversy, since factual aspect is not in dispute, I think it appropriate to first consider the various judgments cited by the learned counsel on

either side, so as to be clear about the aspects which are required to be considered, in view of the various judgments cited at the Bar.

However, even before taking up the cases, it would be appropriate to quote the provisions of Section 3 (vii) of the Act, so also Section 3(f) of the Hindu Succession Act which read as under:-

> 3(vii) "tenant" means
>
> (a) the person by whom or on whose account or behalf rent is, or, but for a contract express or implied would be payable for any premises to his landlord including the person who is continuing in its possession after the termination of his tenancy otherwise than by a decree for eviction passed under the provisions of this Act; and
>
> (b) in the event of death of the person as is referred to in sub-clause (a) his surviving spouse, son, daughter and other heir in accordance with the personal law applicable to him who had been in the case of premises leased out for residential purpose, ordinarily residing and in the case of premises leased out for commercial or business purposes, ordinarily carrying on business with him in such premises as member of his family upto his death."

Then, I may also quote the provisions of Section 3(f) of the Hindu Succession Act which read as under:-

> "**Section 3. Definition and interpretations.-**(1) In this Act, unless the context otherwise requires-

……..

(f) ‘heir’ means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;”

After quoting the above provisions, I come to the cases cited by the learned counsel for the appellant, being Guljara Singh’s case, Angurbala’s case and N. Krishnammal’s case. So far Guljara Singh's case is concerned, that was a case where the High Court of Punjab was considering the word ‘heir’ on the anvil of provisions of Section 22 of Hindu Adoption and Maintenance Act, 1956. According to which, subject to the provisions of Sub-section 2, the heirs of the deceased “Hindu” are bound to maintain all the dependents of the deceased. A look at the judgment shows, that the learned Division Bench proceeded with the assumption that “heir” has not been defined in that Act, nor has any other definition of the word, contained in any other provision of the law, in pari-materia, was referred to. In my view, a bare look at Section 3(f) is enough to show, that Succession Act specifically prescribes a definition. It is a different story, that notwithstanding this the learned Division Bench held, that generally speaking the heirs are those persons whom the law declares to be entitled to the estate of a deceased person, and in common legal parlance the word “heir”, like the expression 'heir-at-law', undoubtedly connotes, and is suggestive of a person, who succeeds to the estate in case of intestacy,

under the statutes of succession. May be that the learned Division Bench further went on observing the common speech comprehension of the term. In my view, such common speech comprehension cannot be given any weightage, on the face of the existence of the statutory definition of the term. In Angurbala's case, the question was, about the right of succession to be vesting in the women in 'shebaiti', and in that context it was found, that the word "heir" cannot normally be limited to issues only. It extended to all persons who were entitled to succeed under the law of inheritance. Suffice it to say, that Hon'ble the Supreme Court was not concerned about the question of right of the person claiming under the will, to be falling within the definition of the term "heir". It is not in dispute, that all persons who are entitled to property under the law of inheritance applicable to the deceased would fall within the definition of the term "heir". In N. Krishnammal's case of course, the judgment in Angurbala's case was followed, and it was held, that the terms, such as "my heirs" used in the will must be construed in the legal sense, unless contrary intention is clearly expressed by the testator. Significantly in that case, a will was executed on 12.12.1927, and thereafter the then existing first class heirs died, and the question which fell for consideration was about interpretation of expression "my heirs" used in the will, and in para-17 it was held, that the expression had to be construed as equivalent to "my legal heirs", and

was not intended to create a gift to any artificial class of heirs. The words were found to indicate, that in the event of Nataraja's death, without any male issue, further devolution of the estate that had been given to him for life, would be regulated in favour of the testator's heirs, ascertained in accordance with the Hindu Law of intestate succession. In my view, this judgment rather supports the proposition, that the word “heir” is required to be interpreted to mean, the person entitled to succession to the property of an intestate.

I may now take up the cases cited by the learned counsel for the respondent. In this sequence I may first of all take up the Constitutional Bench judgment of Hon’ble the Supreme Court, in Gian Devi's case, which arose from the provisions of the Rent Control Act of Delhi, the Hon'ble Supreme Court noticed, that there is a divergence of opinion on the question, as to whether the heirs of a deceased tenant, whose contractual tenancy in respect of commercial premises has been determined, can inherit the tenancy rights of the deceased tenant, and can claim the benefit and protection, to which the deceased tenant was entitled under the Act?

I may gainfully quote Paras 23 and 24 of this judgment, which read as under:

"23. For an appreciation of the question it is necessary to understand the kind of protection that is sought to be afforded to a tenant under the Rent Acts and his status after the termination of the contractual tenancy under the Rent Acts. It is not in dispute that so long as the contractual tenancy remains subsisting, the contractual tenancy creates heritable rights; and, on the death of a contractual tenant, the heirs and legal representatives step into the position of the contractual tenant; and, in the same way on the death of a landlord the heirs and legal representatives of a landlord become entitled to all the rights and privileges of the contractual tenancy and also come under all the obligations under the contractual tenancy. A valid termination of the contractual tenancy puts an end to the contractual relationship. On the determination of the contractual tenancy, the landlord becomes entitled under the law of the land to recover possession of the premises from the tenant in due process of law and the tenant under the general law of the land is hardly in a position to resist eviction, once the contractual tenancy has been duly determined. Because of scarcity of accommodation and gradual high rise in the rents due to various factors, the landlords were in a position to exploit the situation for unjustified personal gains to the serious detriment of the helpless tenants. Under the circumstances it became imperative for the legislature to intervene to protect the tenants against harassment and exploitation by avaricious landlords and appropriate legislation came to be passed in all the States and Union Territories where the situation required an interference by the legislature in this regard. It is no doubt true that the Rent Acts are essentially meant for the benefit of the tenants. It is, however, to be noticed that the Rent Acts at the same time also seek to safeguard legitimate interests of the landlords. The Rent Acts which are indeed in the nature of social welfare legislation are intended to protect tenants against harassment and exploitation by landlords, safeguarding at the same time the legitimate interests of the landlords. The Rent Acts seek to preserve social harmony and promote social justice by safeguarding the interests of the tenants mainly and at the same time protecting the legitimate interests of the landlords. Though the purpose of the various Rent Acts appear to be the same, namely, to promote social justice by affording protection to tenants against undue harassment and exploitation by landlords, providing at the same time for adequate safeguards of the legitimate interests of the landlords, the Rent Acts undoubtedly lean more in

favour of the tenants for whose benefit the Rent Acts are essentially passed. It may also be noted that various amendments have been introduced to the various Rent Acts from time to time as and when situation so required for the purpose of mitigating the hardship of tenants.

24. Keeping in view the main object of Rent Control Legislation, the position of a tenant whose contractual tenancy has been determined has to be understood in the light of the provisions of the Rent Acts. Though provisions of all the Rent Control Acts are not uniform, the common feature of all the Rent Control Legislation is that a contractual tenant on the termination of the contractual tenancy is by virtue of the provisions of the Rent Acts not liable to be evicted as a matter of course under the ordinary law of the land and he is entitled to remain in possession even after determination of the contractual tenancy and no order or decree for eviction will be passed against a tenant unless any ground which entitles the landlord to get an order or decree for possession specified in the Act is established. In other words, the common feature of every Rent Control Act is that it affords protection to every tenant against eviction despite termination of tenancy except on grounds recognised by the Act and no order or decree for eviction shall be passed against the tenant unless any such ground is established to the satisfaction of the Court."

(*Emphasis Supplied*)

Learned counsel for the respondent referred to para 34 of this judgment. In my view, this para 34 gives the reasonings; however, the findings have been recorded in para 36, which reads as under:

"36. Accordingly, we hold that if the Rent Act in question defines a tenant in substance to mean a tenant who continues to remain in possession even after the termination of the contractual tenancy till a decree for eviction against him is passed, the tenant even after the determination of the tenancy continues to have an estate or interest in the tenanted premises and the tenancy rights both in respect of residential premises and commercial premises are heritable. The heirs of the deceased

> tenant in the absence of any provision in the Rent Act to the contrary will step into the position of the deceased tenant and all the rights and obligations of the deceased tenant including the protection afforded to the deceased tenant under the Act will devolve on the heirs of the deceased tenant. As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be enjoyed. If the Legislature makes any provision in the Act limiting or restricting the benefit and the nature of the protection to be enjoyed in a specified manner by any particular class of heirs of the deceased tenant on any condition laid down being fulfilled, the benefit of the protection has necessarily to be enjoyed on the fulfillment of the condition in the manner and to the extent stipulated in the Act. The Legislature which by the Rent Act seeks to confer the benefit on the tenants and to afford protection against eviction is perfectly competent to make appropriate provision regulating the nature of protection and the manner and extent of enjoyment of such tenancy rights after the termination of contractual tenancy of the tenant including the rights and the nature of protection of the heirs on the death of the tenant. Such appropriate provision may be made by the Legislature both with regard to the residential tenancy and commercial tenancy. It is, however, entirely for the Legislature to decide whether the Legislature will make such provision or not. In the absence of any provision regulating the right of inheritance, and the manner and extent thereof and in the absence of any condition being stipulated with regard to the devolution of tenancy rights on the heirs on the death of the tenant, the devolution of tenancy rights must necessarily be in accordance with the ordinary law of succession."
>
> (*Emphasis Supplied*)

S.J. Pande's case, is a case under the Bombay Act whereunder statutory tenant was not conferred any transferable interest, and interpreting those provisions it

was held, that in absence of any legislation touching the contract, it appears to be settled, that a contractual tenant is left with no transferable right after determination of his tenancy.

Then, coming to Jaspal Singh's case; which arose from provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. In that case, the deceased was in occupation of the commercial premises who executed a Will conveying all his rights and properties including tenancy rights in disputed shop, though he had left behind him widow. The definition of the tenant under that act reads as under:

> "3. In this Act, unless the context otherwise requires-
>
> (a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death-
>
> (1)in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;
>
> (2)in the case of a non-residential building, his heirs;..."

The legatee in this case was a nephew of the deceased and he was not found to be the heir of the deceased tenant and the eviction order was passed.

Now I take up Bhavar Lal's case, which is a case

arising from Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, whereunder the definition of tenant has been given in Section 5(11), which reads as under:-

> "5(11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes-
>
> (a) such sub-tenants and other persons as have derived title under a tenant before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 (Bom. Ord. No.3 of 1959),
>
> (aa) any person to whom interest in premises has been transferred under the proviso to sub-section (1) of Section 15:
>
> (b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance (Bom. Ord. No.3 of 1959),
>
> (c)(i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of or within three months immediately preceding the death of the tenant as may be decided in default of agreement by the court, and
>
> (ii) in relation to premises let for business, trade or storage any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage, as the case may be in the said premises and as may be decided in default of agreement by the court."

In this case, the previous judgments in Gian Devi's case and Jaspal Singh's case etc. have all been considered, and the judgment of the Full Bench of Bombay High Court in Dr. Anant Trimbak Sabnis Vs. Vasant Pratap

Pandit was approved, and it was held, that the legislative intent was to prohibit testamentary tenancy rights, and thus, person claiming under Will was not held entitled to any protection.

It may be noticed here, that this judgment of the Full Bench of Bombay High Court in Dr.Anant Trimbak's case was affirmed by the Hon'ble Supreme Court, on appeal also, vide judgment, in Vasant Pratap Pandit Vs. Dr. Anant Trimbak Sabnis, reported in (1994) 3 SCC 481, and it was positively held, that the expression transfer, which has been qualified in the legislation by the words "in any other manner", should not be restricted to mean only transfer inter vivos and includes the transfer by testament also, which being prohibited. The legatee cannot be said to be any better then the transferee.

This judgment in Vasant Pratap's case was also relied upon by learned counsel for the respondent. In this case Hon'ble the Supreme Court, in para 13, referred with approval the meaning of the term "heir" as given in the Black's Law Dictionary, 6th Edn. at pp.723 and 724: which reads as under:

> "Heirs. At common law, the person appointed by law to succeed to the estate in case of intestacy. One who inherits property, whether real or personal. A person who succeeds, by the rules of law, to an estate in lands, tenements, or hereditaments, upon the death of his ancestor, by descent and right of relationship. One

> who would receive his estate under statute of descent and distribution. Faulkner's Guardian v. Faulkner. Moreover, the term is frequently used in a popular sense to designate a successor to property either by will or by law.
>
> Heir at law. At common law, he who, after his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised. The same as 'heir general'.
>
> A deceased person's 'heirs at law' are those who succeed to his estate of inheritance under statues or descent and distribution, in absence of testamentary disposition, and not necessarily his heirs at common law, who are persons succeeding to deceased's realty in case of his intestacy.
>
> Heir testamentary. In the civil law, one who is named and appointed heir in the testament of the decedent. This name distinguishes him from a legal heir (one upon whom the law casts the succession), and from a conventional heir (one who takes it by virtue of a previous contract or settlement).”

Now, I take up Vasant Pratap’s case. This case arose from Bombay Rent Control Act. Relevant provisions of Section 5 thereof have already been quoted above. In this case the previous judgments in Jaspal Singh’s case and Bhavarlal’s cases were also considered, and affirmed, the definition of “heir” as given by Black’s Law Dictionary was quoted with approval, and then it was held, that the person claiming under will does not enjoy any protection under the Bombay Act, as the intention of the legislature was, that in case no member of the family, as referred to in the first part of the clause, is the heir, who under the ordinary mode of succession could necessarily be relation of the deceased, should be treated as tenant of the

premises subject, however, to the decision of the Court in default of the agreement, these words "as may be decided in default of the agreement by the Court" were held to be significant, leaving it for the Court to decide, in case of disagreement. Therefore, if heir is to include a legatee, then these words cannot be applied in the case of a tenant who leaves behind more than one legatee. Then, in para 16, interpreting Section 15 of the Bombay Act, it was found, that the word "assign" or "transfer" was held to be given wide amplitude, as the language is "in any other manner", and thus it was held, that the word "transfer" is used in a sense, so as to include the transfer of a testamentary nature also. Obviously, thus, it was held, that legatee does not fall within the definition of 'heir', and that testamentary disposition also amounts to "transfer' 'in any other manner'.

Thus, since in Gian Devi's case it has clearly been held by the Constitutional Bench, that the protection afforded by the Rent Act to a tenant, after determination of the tenancy, and to his heirs on the death of such tenant, is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection, to make appropriate provisions in the Act with regard to the nature and extent of the benefit, and protection to be enjoyed, and the manner in which the same is to be enjoyed. If the Legislature makes any provision in

the Act, limiting or restricting the benefit, and the nature of the protection to be enjoyed, in a specified manner, by any particular class of heirs of the deceased tenant, on any condition laid down being fulfilled, the benefit of the protection has necessarily to be enjoyed on the fulfillment of the condition, in the manner, and to the extent, stipulated in the Act. The Legislature which by the Rent Act seeks to confer the benefit on the tenants and to afford protection against eviction is perfectly competent to make appropriate provision, regulating the nature of protection, and the manner and extent of enjoyment of such tenancy rights, after the termination of contractual tenancy of the tenant, including the rights and the nature of protection of the heirs, on the death of the tenant. Such appropriate provision may be made by the Legislature, both with regard to the residential tenancy, and commercial tenancy. It is, however, entirely for the Legislature to decide, whether the Legislature will make such provision or not. In the absence of any provision regulating the right of inheritance, and the manner and extent thereof, and in the absence of any condition being stipulated, with regard to the devolution of tenancy rights on the heirs, on the death of the tenant, the devolution of tenancy rights must necessarily be in accordance with the ordinary law of succession.

Therefore, the matter rests in the realm of the

provisions of the relevant Rent Control only. That being the position it would be appropriate to now consider, the two judgments of this Court, being in Gopi Kishan's case and Chiman Lal's case, relied upon by the learned counsel for the plaintiff respondent.

In Chiman Lal's case it was held in para-17 as under:-

> "17. In my humble opinion, if the premises, which is subject-matter of disputed tenancy in a suit is not found in the enjoyment of the original tenant at the time of his death in State of jointness with his heirs and legal representatives, death of the original tenant results in folding of the protective umbrella contemplated under Section 3 (vii) (b) of the Act of 1950 and after death of the tenant his heirs and legal representatives would not be entitled to the protection referred in the aforesaid section."

In Gopi Kishan's case in para 21 to 27 it was held as under:-

> "21. A close scrutiny of Sec.3(vii)(b) of Act No.17 of 1950 leads towards an irresistible conclusion that before a person becomes entitled either to be impleaded as a party in a suit for ejectment under the said Act or claims himself to be the tenant of a deceased, he is required to establish that he is heir of deceased in accordance with the personal law applicable to him in the case of premises leased out for residential purposes residing and in case of premises leased out for commercial or business purposes carrying on business with him in such premises as member of his family up to his death.
>
> 22. In the present case the dispute is relating to a shop which was admittedly let out to deceased Rampratap for business purposes and

factually he was alone doing business over the suit shop, therefore, for impleadment as a necessary party and also for claiming to be tenant of the disputed shop, two conditions precedent are required to be established. Firstly, that the person who is claiming himself to be impleaded as a party or who is claiming himself to be the tenant of the disputed shop must establish that he is heir in accordance with the personal law applicable to deceased Rampratap and secondly, he was carrying on business with him in such premises as member of his family up to his death.

23. I am of the opinion that breach of either of the conditions precedent enumerated above snaps of the rights denuding the continuity of statutory tenancy within the meaning of S.3 (vii)(b) of Act No.17 of 1950 and an argument contrary to it is not leviable.

24. On the aforementioned ground it is specifically held that the plaintiff-appellant has rightly filed the suit against the present defendant-respondents who are wrongly claiming themselves to be heirs of deceased Rampratap while his widow Smt. Suraj Devi is still alive. Since the defendant-respondents are retaining possession of the shop in question illegally claiming themselves to be heirs of deceased, therefore, the plaintiff-appellant was perfectly justified to file a suit for ejectment against them under Act No.17 of 1950.

25. Although Smt. Suraj Devi is heir of deceased Rampratap but indisputably since she was not carrying on business with her deceased husband Rampratap, thereore, she fulfils only one condition and other condition is lacking hence she is not necessary party in the present suit and the plaintiff appellant is fully justified not to implead her.

26. As regards the claim of the defendant-respondents of being tenant of the shop in question they have proved only one condition about carrying on business with deceased Rampratap without disclosing their capacity whether as a servant or as a partner. But they miserably failed to establish themselves as heirs of deceased, therefore, they are not entitled to claim themselves to be the tenant of the shop in question.

> 27. In my humble opinion for impleadment as a party in a suit under Act No.17 of 1950 and <u>for acquiring status of tenant under S.3(vii)(b) of the said Act, both the conditions precedent required to co-exist. If any one of them is missing then no one can claim either to be impleaded as a party or claim himself to be the tenant of the shop in question.”</u>
>
> (*Emphasis Supplied*)

Significantly, in this case, the suit was filed against a person in possession of the premises, while the statutory tenant had died, and the person in possession not being the heir, and the heirs being not carrying on business, not only suit was decreed, it was also found, in para-28, 29 and 30, that allowing the defendant to occupy the premises, who was not the heir, without permission of the landlord clearly constitutes an act of parting with possession by the deceased in favour of the defendant, which is per se illegal, in view of the provisions of Section 13(1)(e).

Thus, from the reading of the Section 3(vii) of the Act, it is clear, that for the present purposes, in order to entitle to fall within the definition, Nihal Chand should fall within the expression, <u>“other heir in accordance with the personal law applicable to him who had been.... ordinarily carrying on business with him in such premises as member of his family upto his death”</u>.

In the above background coming to the facts of the case, the case of the appellant is, that Nihal Chand was ordinarily carrying on business with him in the premises, and was so carrying on business as member of the family. It is a different story, that a contention has also been raised on the side of the respondent, that Nihal Chand cannot be said to be carrying on business as member of his family. However, the substantial controversy, on which the parties are at issue, is, as to whether Nihal Chand falls within the category "other heir in accordance with the personal law applicable to him" rather the question is, as to whether Nihal Chand can be said to be "heir" of the appellant Mishrimal, in accordance with personal law.

Learned counsel for the appellant in this regard submitted, that the personal law applicable is Hindu Succession Act, and it divides succession into two types; one being covered by Chapter II, Intestate Succession, and the other being, as provided by Chapter III being Testamentary Succession, and the person succeeding to the shop of the deceased by either of these nature of succession, is obviously an heir. Nihal Chand being testamentary successor, is very much heir of the deceased. Relying on the judgments in Guljara Singh's case, Angurbala's case and N. Krishnammal's case, it was contended, that expression should be given a broad, and

general meaning.

On the other hand, learned counsel for the respondent, in this regard submitted, that the expression "heir" is defined in Section 3(f) of the Hindu Succession Act, to mean, the person entitled to succeed the property of intestate, under the Act, and submitted, that on the face of the statutory definition, person receiving under testamentary document cannot be said to be heir, rather even testamentary disposition is a nature of assignment, which is rather prohibited by Section 13(1)(e) of the Act. With the result, that such assignment, on the other hand, may place the assignee in the category of legatee in possession of such tenancy, in whose favour possession has been parted with, and such person can by no stretch of imagination be allowed to claim as heir.

Then, referring to the judgment in Vasant Pratap's case it was submitted, that statutory tenancy is not estate, which can be assigned or disposed of by testamentary documents, and therefore, also Nihal Chand cannot be said to be heir. More over on the face of the fact, that admittedly class-I heir, being the four sons, which include the father of Nihal Chand, are very much alive, relying on the judgment of Smt. Gian Devi's case, S.J. Pande's case and Jaspal Singh's case, it was reiterated that statutory tenant has no transferable right.

Then, relying upon judgment in Gopi Kishan's case and Chiman Lal's case, it was contended that Nihal Chand cannot be said to be falling within the definition of term "heir".

A perusal of Section 3(f) of the Succession Act quoted above does make it clear that the Hindu Succession Act gives a statutory definition of term "heir", and obviously, therefore, this leaves no room for any objection regarding the term, so as to require interpretation of the term in the present context.

Admittedly for the purpose of heir-ship the personal law applicable to the deceased is Hindu Succession Act. Consequently, the bare reading of the term "heir" as defined in Section 3(f) clearly confines the meaning to the person who succeed the property of an intestate, clearly excluded the person/persons who succeed on the basis of testamentary documents.

In my view, the question turn simply by applying the acid test, as to what is the concept of "heir" or "other heir", within the meaning of Section 3(vii), but the question involves various facets, and has far reaching implications. Therefore, the case is required to be considered on all relevant stand points.

At the outset it may be clarified that the

controversy is not required to be viewed from the stand point as to who; can be said to be the successor of the deceased, to inherit or succeed to the property of the deceased, the more important question is, in the background of provisions of the Act, inasmuch as, to which category of class or relation of persons does the Act intend to provide protection of the Act, and whether the protection is intended to be made available to the heir of an intestate, or to all persons who otherwise succeed or inherit the property of the deceased, provided of course, that the other two conditions of Section 3(vii)(b) of the Act are complied with. From this stand point the matter is required to be examined.

If considered on the parameters of the legal position as found above, emerging from various judgments of Hon'ble the Supreme Court, there is no escape from the conclusion, that the term "heir" as interpreted in Guljara Singh's case, Angurbala's case and N.Krishnammal's case was interpreted in entirely different context, and I have found in N.Krishnammal's case that following Angurbala's case Hon'ble the Supreme Court indicated that it should refer to intestate. In that background considering spirit and scope of protection intended to be extended by Section 3(vii) of the Act, in my view, since it is clearly established from the judgments referred to above specially Vasant Pratap's case, that testamentary disposition is also a nature of

assignment, different from one may from inter vivos, and since assignment is prohibited by Section 13(1)(e) of the Act, such assignee under the will cannot be indirectly allowed to claim protection, under the garb of claiming to be an heir.

Controverting the contention of the learned counsel for the respondent about the hazards of permitting the legatee to be heir to be resulting into likelihood of will being made in favour of any one in absence of expression in that regard under the Succession Act. It was contended by the learned counsel for the appellant, that there are enough safeguards in the language of Section 3 (vii)(b), inasmuch as even a legatee heir is entitled to claim protection if it is shown that the legatee carried out business with the deceased at the time of his death as member of his family, and therefore, if the will is in favour of any of the member of the family then only he can claim protection and not otherwise. It was also contended that in common parlance the family obviously include the grand children.

In my view, these questions need not detain me, for the simple reason, that all said and done a distinction is required to be drawn between the three expressions, “heir”, “legatee”, and “successor”. For the purpose of Section 3(vii) the three words cannot be used as synonyms,

the distinction is per se clear from the language of Section 3(vii) of the Act. The language of Section 3(vii) in my view clearly means to provide protection not even to all the heirs, much less testamentary successors, but only to such of the heirs in accordance with the personal law who were carrying on business with the tenant as member of his family at the time of his death. There may be situation that the person may not be having any heir of Class-I, carrying on business with him for variety of reasons including affluence or embracing family relations, or the like, and deceased in that case may like to have included any distant relation, with a view to take care of himself, and the business, and if such meaning is given, obviously it would be very liberal connotation, and the person may claim protection if the will happens to be there in his favour, but then, the person claiming in that situation is not contemplated to be protected by the act. The act only means to extend protection to the heirs, in my view, heirs falling in Section 3(f) of the Succession Act.

So far as the contention raised about Chapter II and Chapter III of the Succession Act is concerned, again a distinction is to be drawn between the 'successor' and the 'heir'. Section 30 though bears the title of testamentary successor, but then it does not even purport to make the legatee an heir, inasmuch as, what Section 30 provides is to confer a right to any Hindu to dispose of by will or

other testamentary disposition, any property which is capable of being so disposed of by him. Thus, it is clearly a sort of assignment, which is brought into effect after death of testator, whereby the assignee, who is commonly described as 'legatee'. But then such legatee cannot be said to be heir of the deceased. There is yet another aspect viz. that the extent of share or right of the heir in property of the deceased is uncertain upto the death of the deceased, inasmuch as for the property of the deceased the number of heirs may fluctuate, while in the case of will, irrespective of number of heirs, or existence or otherwise of any heirs, the right of legatee, and the extent of property to be received by him as legatee, is determined by the will, in my view, this also should be taken into consideration, which may distinguish a legatee from an heir as such.

Thus, considering the case from all aspects as noticed above, in my view a legatee i.e. the person claiming under a will of statutory tenant cannot claim protection of the Act, unless he is otherwise an "heir" within the meaning of Section 3(vii) of the Act read with Section 3(f) of the Succession Act, and also unless he could satisfy the other requisite conditions of Section 3 (vii) of the Act.

Admittedly Nihal Chand being grand son, in

presence of his father Lal Chand, cannot be said to be the heir of the deceased Mishrimal, and therefore, he is not entitled to the protection of the Act.

Consequently, he being not entitled to protection, is not entitled to maintain the present appeal as well, and the same is, therefore, dismissed.

Accordingly, the appeal is required to be dismissed as not surviving, on account of death of Mishrimal, and the protection being not available to Nihal Chand, and no other heir, fulfilling the other requirements of Section 3(vii)(b) of the Act being available.

The appeal is accordingly dismissed. The parties shall bear their own costs.

At the request of the learned counsel for the appellant, the appellant is given six months' time to vacate the suit premises on the condition that the defendant gives an undertaking before the learned trial court within one month from today that on or before the expiry of the above period, he will peacefully hand over the vacant possession of the suit premises to the plaintiff and that during this period, he will not, in any manner, transfer the possession of the suit premises to anybody.

Likewise, the entire decreetal amount, so also all arrears of rent, if any, shall be deposited by the appellant in the trial court within one month from today, and shall further continue to deposit amount equal to the monthly rent by way of damages for use and occupation, by 15th of each succeeding month, till the actual delivery of possession. In case the appellant fails to comply with any of the above conditions, the respondents will become automatically entitled to execute the decree forthwith.

(N P GUPTA),J.